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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 182

TEXAS STATE AFL-CIO, ANTONIO AGUILAR, JULIA AMAYA, ET AL, *Petitioners*,

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, and RAYMOND F. FARRELL, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, *Government Respondents*,

and

TOMAS ALVARADO (LUGO), CARLOTTA ARELLANES (LEYVA), CONCEPCION AURORA CAGIGAS FRAIJO, ET AL, *Intervenor Respondents*.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF FOR INTERVENOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The United States District Court for the District of Columbia dismissed this action without opinion. (J.A. 108).[1] The opinion of the Court of Appeals

[1] "J.A." Refers to the Joint Appendix in the Record.

(App. B of Petition, pp. 23a-28a) is reported at 330 F. 2d 217. The Court's opinion was amended and supplemented by an Order dated March 23, 1964 (App. D of Petition, pp. 31a-32a).

JURISDICTION

The Petition adequately outlines the basis upon which the jurisdiction of this Court is invoked.

QUESTION PRESENTED

Whether a labor organization and the residents of five Texas counties have standing to sue the Attorney General and the Commissioner of Immigration and Naturalization in order to seek a change in the classification of "commuters"[2] by United States Immigration officials from a classification of "immigrant" to one of "non-immigrant" and thereby to cancel the status and rights acquired by commuters under United States immigration laws.

STATUTES INVOLVED

The statute involved in this suit is the Immigration and Nationality Act of 1952 (66 Stat. 163 *et seq.*, 8 U.S.C. § 1101, *et seq.*). In addition to the portions of this statute set forth in the Appendix to the Petition (App. A of Petition, pp. 1a-23a), Intervenor Respondents point to Section 316(a), (66 Stat. 242

[2] The term "commuter" as used in this brief describes an alien who has been classified by the United States immigration officials as an immigrant and afforded the *privilege* of permanent residence in the United States as one "lawfully admitted for permanent residence" in accordance with Section 101(a)(20), 8 U.S.C. § 1101(a)(20) of the 1952 Immigration and Nationality Act and who commutes to a place of employment in the United States from his home in foreign contiguous territory, i.e., Mexico or Canada.

(1952), 8 U.S.C. § 1427(a)), and to Section 401(a), (d) and (e), (66 Stat. 274 (1952), 8 U.S.C. § 1106(a), (d) and (e)) of the Act. These additional portions of the statute are set forth in Appendix A to this brief.

STATEMENT

In this litigation a Texas labor organization and 188 residents of five Texas counties seek, through the judicial arm of the government, to bring about a sudden, fundamental, and dramatic change in the administration of the United States immigration laws. Petitioners, in effect, seek through the instrumentality of the courts, to bring an end to the commuter program presently in effect along the entire United States-Mexican and United States-Canadian borders. This program, in its present form, dates back to 1927. It is a part of reciprocal relations among the United States, Canada, and Mexico. *Matter of F—*, unreported, A-6300563, B.I.A. (Dec. 30, 1946).

Petitioners challenge the classification conferred on each and every commuter by United States immigration officials. Since 1927 these officials have consistently and continuously classified commuters as "immigrants." Petitioners, with no valid basis, as will be shown in the Argument portion of this Brief *infra*, contend that commuters should be classified instead as "non-immigrants." Petitioners' contention flies in the face of the law and of 37 years of consistent administrative practice by the agency charged with administering the law. (Argument, *infra*) Petitioners would also sweep aside—with resulting sudden and staggering hardship to the commuter and his dependents—the classification status and rights which have been conferred through the years on commuters by United States immigration officials.

The Commuter Program

Since 1927 United States immigration authorities have consistently classified and conferred upon commuters (1) the status of "immigrants"[3] and (2) the status of being "lawfully admitted for permanent residence." Like all immigrants, commuters have been afforded the *privilege* of residing permanently in the United States. The Immigration Service has never required that the commuter exercise the privilege of establishing permanent residence in the United States in order to maintain his status.

A discussion as to the origin of the commuter program (it emerged from discussions on "high diplomatic levels")[4] and its operation is set forth in the opinion of the Board of Immigration Appeals in *Matter of M— D— S—*, 8 I. & N. Dec. 209 (1958). A copy of this opinion is set forth in Appendix B to this brief.

In 1954, the Board of Immigration Appeals in *Matter of H— O—*, 51 I. & N. Dec. 716 (1954), considered the question whether the Immigration and Nationality Act of 1952 in any way changed the long established commuter practice. The Board in a carefully considered and well documented opinion expressed its conclusion that it did not. A copy of the Board's

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[3] In contrast to a classification of "non-immigrant." An immigrant is afforded the privilege of establishing permanent residence in the United States. A non-immigrant is not. An immigrant may in time become a naturalized U. S. citizen; a non-immigrant may not. There are several other differences between the two classifications.

[4] See also *Matter of F—*, unreported, A-6300563, B.I.A. (Dec. 30, 1946), where the Board of Immigration Appeals refers to the commuter program as "part of reciprocal arrangements with Canada and Mexico."

decision is attached hereto as Appendix C to this brief. Petitioners' contention is that the 1952 Act "outlawed" the commuter program. The Board stated its conclusion as to this question at page 718 of the opinion:

> "It is therefore concluded that the practice of considering commuters as permanent residents has not been disturbed by the act of 1952, *but rather it has impliedly received congressional approval, since the legislative history of the act reveals a discusion (sic) without dissent.*" (Emphasis supplied)

Grave Importance Of This Suit To Commuters

On December 30, 1961, Tomas Alvarado (Lugo) and eighteen other commuters petitioned the District Court for leave to intervene as defendants in this action both as individuals and as representatives of the class of Mexican commuters. (J.A. 30-33) Each Applicant for Intervention was a Mexican citizen (1) who had been classified by the Immigration and Naturalization Service as an immigrant and as being lawfully admitted for permanent residence and (2) who commuted from his home in Mexico to employment in the United States. The issues raised by the complaint were, of course, of vital and most serious importance not only to the intervenor commuters but to all commuters, both Mexican and Canadian. The court granted intervention January 29, 1962. (J.A. 36).

The affidavits of the Intervenors, attached to their answer filed with the District Court, disclose the overwhelming hardship that would result to Mexican commuters if they were to lose their status and rights. (J.A. 42-66). As disclosed by the affidavits, commuters have been working in this country, some continuously,

since 1927. They have wives, children, parents, and other relatives in Mexico who are entirely dependent upon them for support. Many members of these families would be ineligible to come into the United States if the commuter were to lose his right to commute and the commuter would financially be unable to support two homes.[5]

In acquiring their rights and status, commuters have been advised by United States immigration officials that it is not necessary for them to have actual residence in the United States. (J.A. 51). The commuters have relied upon these representations of United States officials and have fashioned their lives and those of their dependents around the right to commute. To take this right away would result in overwhelming hardship to commuters and their dependents.

The Commuter Program is Part of the Foreign Relations of the United States

An affidavit of the United States Secretary of State Dean Rusk filed with the District Court in this action points up the fact that the issues raised in this suit have a direct bearing upon the foreign relations of the United States with its neighbors, Mexico and Canada, and with other nations. The Secretary of

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[5] An indication of this hardship may be gained by reading the affidavits of the Intervenor Appellees. The hardship to Tomas Alvarado (Lugo) is typical. His affidavit discloses: "That he supports in Mexico his wife, six children and his mother who is old. That he is employed in El Paso, Texas as a polisher. That if he were to lose his right to commute, it would work great personal and economic hardship on himself and his family; that he would be financially unable to bring all whom he supports to the United States, and that he would be unable to support two homes." (J.A. 42).

State, in his affidavit, dated November 5, 1962, concluded:

> ". . . it is my opinion that a judgment on the merits in this case would be undesirable from the standpoint of the foreign relations of the United States. A decision which resulted in a sudden change in the commuter practice at our borders would adversely affect our relations with Mexico, with Canada, and perhaps with other nations of the Western Hemisphere." (J.A. 85).

The Secretary also stated in connection with the commuter practice as follows:

> "In my judgment the present practice with regard to commuters across the United States-Mexican border contributes to the friendly relations between the United States and Mexico. . . .
>
> ". . . In a very real sense, the cities along the border—for example, El Paso and Juarez, Eagle Pass and Piedras Negras, Laredo and Nuevo Laredo, Brownsville and Matamoros, and San Diego and Tijuana—have grown into single economic communities. A disruption in the life of these communities would do real harm to good neighbor relations in the area.
>
> * * * * *
>
> "Because of the size and influence of Mexico in Latin America, the success of the Alliance for Progress will depend in large measure on the achievement of this program in Mexico. The harm to United States-Mexican relations which I believe would be the result of a termination of the commuter practice could seriously jeopardize the Alliance for Progress in Mexico, and thus in all Latin America.
>
> "The present practice with regard to commuters is in effect not only at the border between the

United States and Mexico, but also at the border between the United States and Canada. The Government of Canada, like the Government of Mexico, has expressed its concern over the present litigation, and an adverse decision could also adversely affect our relations with Canada and the status of United States nationals and property employed in that country. (J.A. 83-85).

The Commuter Program Also Bears Upon Domestic "Political" Issues

The Congress in enacting the Immigration and Nationality Act of 1952 established a Joint Committee on Immigration and Nationality Policy whose function it would be to make a continuous study of the administration of the Immigration and Nationality Act of 1952. § 401(a), 8 U.S.C. § 1106(a), (App. A, p. 1a). The committee is to continuously review the effects of the administration of the immigration provisions of the Act "on the national security, the economy, and the social welfare of the United States." § 401(d), 8 U.S.C. § 1106(d). (App. A, p. 1a).

The Congress is well aware of the commuter program. In fact, the Congress is presently studying the question of "commuter workers". See Staff of Sub-Comm. No. 1, House Comm. on the Judiciary, 88th Cong., 1st Sess., Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment, and "Commuter Workers" (Comm. Print. 1963). We submit that the political considerations involved in immigration questions such as the classification to be afforded commuters should be left with the Congress. The courts have traditionally

refrained from considering questions of immigration policy.[6]

Petitioners Have Not Exercised Their Administrative Remedy

Petitioners have an administrative remedy. Petitioners, however, have been silent about their administrative remedy. Instead, they have sought a judicial remedy.

The Immigration and Nationality Act of 1952 provides a means of restricting the number of new aliens who may acquire the commuter status. The statute provides that the Secretary of Labor may upon making certain specified determinations under the authority of Section 212(a)(14), 8 U.S.C. § 1182(a)(14), issue a certificate to the Secretary of State and to the Attorney General, and once such a certificate has been issued aliens falling within the scope of the certificate (and who would otherwise enter as "immigrants") are excluded from the country. The Secretary of Labor may issue such certificate in circumstances where he determines that:

> "(A) *sufficient workers in the United States* who are able, willing, and qualified *are available* at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) *the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.*" (Emphasis supplied)

[6] "The conditions for entry of every alien, the particular classes of aliens that shall be denied entry altogether, the basis for determining such classification . . . have been recognized as matters solely for the responsibility of the Congress and wholly outside the power of this Court to control." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596-7 (1952) (concurring opinion).

The Secretary of Labor has in the past issued certificates under the authority of Section 212(a)(14). See *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 115 (D.D.C. 1960). Petitioners omit entirely from their Petition reference to the available administrative remedy. Petitioners, instead, seek a judicial remedy.

ARGUMENT

I

Petitioners' Case "On the Merits" Is Fatally Defective

Petitioners' entire case "on the merits" consists, in substance, of two contentions, neither one of which is valid. Petitioners' contentions are:

(1) That since commuters do not establish permanent residence in the United States, they cannot be considered as "lawfully admitted for permanent residence" under Section 101(a)(20) of the 1952 Immigration and Nationality Act, 8 U.S.C. § 1101(a)(20), and, accordingly, they cannot be classified as "immigrants," and

(2) That commuters should be classified as "non-immigrants," falling into the newly created category of "non-immigrants" provided for by Section 101(a)(15)(H) of the 1952 Act, 8 U.S.C. § 1101(a)(15)(H).[7]

[7] Petitioners also rely on the interlocutory opinion of Judge Youngdahl in *Amalgamated Meat Cutters* v. *Rogers*, 186 F. Supp. 144 (D. C. 1960) denying the Government's motion for dismissal or summary judgment. The facts in that case are entirely different from the facts in this case. The plaintiff union there was seeking an injuction in connection with a certificate issued by the Secretary of Labor under the authority of Section 212(a)(14). No certificate is involved in the instant case. The final order in the action was entered by Judge Walsh. It did not mention or refer to Judge Youngdahl's ruling. Since the number of commuters involved had

With regard to the first contention, it is Petitioners' theory that the statutory definition of the term "lawfully admitted for permanent residence," as set forth in the introductory definitions portion of the 1952 law, creates a requirement that an immigrant so classified must establish permanent residence in the United States.

Section 101(a)(20) provides:

> "The term 'lawfully admitted for permanent residence' *means the status of having been lawfully accorded the privilege* of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." (Emphasis supplied).

Petitioners would have the court ignore entirely the fact that the statutory definition talks in terms of the *privilege* of residing permanently in the United States. This statutory definition dovetails precisely with the practice of the United States Immigration Service for a period of 25 years prior to the 1952 enactment. Since 1927 commuters had been regarded and classified by the U.S. Immigration Service as immigrants "lawfully admitted for permanent residence." *Matter of H— O—*, 5 I. & N. Dec. 716 (1954); *Matter of L—*, 4 I. & N. Dec. 454 (1951). Commuters were consistently afforded the privilege of residing permanently in the United States. There was no requirement that the privilege be exercised. Petitioners allege that the definition quoted above changed prior practice and

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dwindled to four, the case was virtually moot and no appeal was taken. Staff of Sub-Comm. No. 1, House Comm. on the Judiciary, 88th Cong., 1st Sess., Study of Population and Immigration Problems, Administrative Presentations (III), Admission of Aliens Into the United States for Temporary Employment, and "Commuter Workers" (Comm. Print. 1963), p. 179.

established permanent residence in the United States as a *sine qua non* for acquiring and maintaining the status of an "immigrant." Petitioners disregard the plain meaning of the words of the statute. The word "privilege" is entirely overlooked. When Congress wants to make residence in the United States a requisite for acquiring a status or rights under the Immigration and Nationality Act it knows how to do so and it does so in clear, specific language. For example, Congress has established residence as a requirement for naturalization. The language of the statute is clear. See Section 316(a), 8 U.S.C. § 1427(a). (App. A, p. 2a). If prior law was to be changed, the commuter practice to be abandoned, the rights and status acquired by commuters under the 1924 Act to be taken away, and permanent residence to be required as a requisite of "immigrant" status, we submit Congress would have said so.

With regard to the second contention, it must likewise be rejected. Petitioners argue that commuters should be classified as non-immigrants in the new class of "non-immigrants" created by Section 101(a)(15)(H) of the 1952 Act, which class is as follows:

> "an alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform other *temporary services or labor,* if unemployed persons capable of performing such service or labor cannot be found in this country . . ." (Emphasis supplied.)

This new category of non-immigrants was created to take the place of the "contract labor" provisions excluding such laborers, contained in prior immigra-

tion laws, but which were deleted from the 1952 Act. The legislative history states on this point:

> "Those provisions in existing law relating to the exclusion of contract laborers . . . are omitted from the bill in view of the adoption of . . . permits for temporary residence on the basis of the need for the labor and services of aliens." H. Rep. No. 1365, 82d Cong., 2d Sess. (1952), U.S. Code Cong. and Adm. News, at p. 1705.

To argue that commuters fall within this newly created class is to fly in the face of 37 years of judicially approved administrative practice. The words "temporary service or labor" have a fixed meaning in immigration law. In 1927 the Immigration Service established the position that a person engaged in regular employment in the United States was not coming to the United States to perform "temporary services." This position was challenged and the United States Supreme Court in *Karnuth* v. *United States ex rel. Albro,* 279 U.S. 231 (1929), upheld the Immigration Service on that very point. The 1952 Act did not change this long standing practice. A person regularly engaged in employment in the United States is not coming to perform "temporary services or labor." See *Matter of H— O—*, 5 I. & N. Dec. 716, 717 (1954); *Matter of M—*, 6 I. & N. Dec. 533 (1955) where the Board of Immigration Appeals stated:

> "The business for which the alien is coming [if he is to be classified as a non-immigrant] must be temporary and not continuing or permanent in character; *not only the visit but the business must be of temporary character.*" [Bracketed material and emphasis supplied.]

II

The Decision Below On The Issue Of Standing Is Correct And In Accord With Decisions On This Issue

The court below found that Petitioners did not have standing to bring this suit. The court held, in effect, that the injuries alleged (and allegedly resulting from the "improper" classification of commuters), e.g., unemployment,[8] reduced wages,[9] difficulties in organizing labor,[10] and animosity between the United States and Mexico,[11] did not create standing in Petitioners.

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[8] In the Petition at footnote 5, p. 7, there are set forth rates of unemployment for six Texas counties along the Mexican border as shown by the *1962 County and City Data Book*, U.S. Department of Commerce Bureau of the Census. At the oral argument in the District Court, Intervenor Respondents urged the court to take judicial notice of the fact that the same source showed that other counties in Texas nowhere near the Mexican border had comparable or greater rates of unemployment. Intervenor Respondents also urged the court to take judicial notice of the publication of the U.S. Department of Labor entitled *Area Labor Market Trends*, December 1962 Supplement. Page 25 thereof shows that the worst areas of unemployment in Texas are not along the Texas-Mexican border.

[9] In the Petition at footnote 6, p. 7, and elsewhere, Petitioners seek to create the impression that low wages prevail in the Texas border towns. To do so, Petitioners rely on a Department of Labor Report prepared by a Mr. Parnass. On November 5, 1962, Intervenor Respondents in "Intervenor's Statement of Genuine Issues in Opposition to Plaintiffs' Motion For Summary Judgment" pointed out that Mr. Parnass had no personal knowledge of the facts contained in the report and argued that the report was inadmissible in evidence and not proper material for consideration by the court. (J.A. 89-90). Furthermore, the Secretary of Labor never did issue a 212(a)(14) certificate on the basis of Mr. Parnass' report. (J.A. 86-87).

[10] The Intervenor Respondents include union members. (J.A. 47, 52, 53 and 57).

[11] See the Affidavit of the United States Secretary of State Dean Rusk (J.A. 83-85).

Petitioners might be described as "outsiders" with respect to the question of the classification conferred on an individual alien or class of aliens by the U. S. Immigration Service. The decisions are in complete unanimity that such "outsiders" have no standing. Such third persons have:

> "no enforecable right to have a particular alien or class of aliens admitted or excluded." *Braude* v. *Wirtz,* Civil No. 63-1459-TC, S.D. Cal., June 1, 1964.

As was held in *Ferrer* v. *Fronton Exhibition Co.,* 188 F. 2d 954 (5th Cir. 1954),

> ". . . While the plaintiffs, like any other citizens, are entitled to the benefits of the statute [the 1952 Immigration Act] generally, it confers no specific rights which are individual or personal to the plaintiffs to have any particular alien or class of aliens excluded . . ." (at 956) (Bracketed material supplied).

If the law were otherwise, religious groups, ethnic groups, geographical areas, political parties, employer groups, professional societies, etc., might all seek to assert judicially their private views on administering the immigration laws and classifying aliens.[12]

The decision of the court below on the standing issue is in complete accord with the recognized principle that mere economic competition made possible

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[12] Even Section 106 of the Immigration and Nationality Act of 1952, as added in 1961, 8 U.S.C. § 1105a (Supp. 1963), which recognizes the right of the individual alien to seek judicial review of an order of exclusion or deportation, does so to a limited extent only. See H. Rep. No. 1086, 87th Cong., 1st Sess., (1961) U.S. Code Cong. & Adm. News, at p. 2966-2977. Cf. *Rusk* v. *Cort,* 369 U.S. 367 (1962).

by governmental action does not give standing to sue. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118 (1939); *Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938); *Kansas City Power & Light Co.* v. *McKay*, 96 U.S. App. D.C. 273, 225 F. 2d 924, cert. denied, 350 U.S. 884 (1955).[13]

Petitioners allege that there is a conflict between the decision below and certain cases which Petitioners cite. We submit that this is not so. An analysis of the cases cited by Petitioners will show that each of them is readily distinguishable from the decision below. Either the cases cited were decided under acts which, unlike the Immigration and Nationality Act, contain a "person aggrieved" or "adversely affected" provision conferring standing on persons who otherwise would not have standing, *FCC* v. *NBC*, 319 U.S. 239 (1943); *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942); *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *International Union of Electrical Workers* v. *United States*, 108 U.S. App. D.C. 97, 280 F. 2d 645 (1960); and *National Coal Ass'n.* v. *Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F. 2d 462 (1951), or the legislative or administrative action complained of was directed specifically at some right or interest of the party bringing suit. *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 283 (1961); *City of Chicago* v. *Santa Fe Ry.*, 357 U.S. 77, 83 (1958); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 140-141 (1951); *Copper Plumbing & Heat-*

[13] Furthermore, the fact that the instant decision is consistent with the prevailing law is illustrated by its citation by other courts. *Pennsylvania R.R.* v. *Dillon*, Civil No. 17753, D.C. Cir., June 26, 1964; *Braude* v. *Wirtz*, Civil No. 63-1459-TC, S.D. Cal., June 1, 1964.

ing Co. v. *Campbell,* 110 U.S. App. D.C. 177, 290 F. 2d 368 (1961); and *Atchison, Topeka and Santa Fe Ry.* v. *Somerfield,* 97 U.S. App. D.C. 325, 229 F. 2d 777 (1955).

Intervenor Respondents submit that the granting of a writ of certiorari in this action would serve no useful purpose. The decision of the court below was a proper one. That decision was in accord with recognized principles with regard to standing. The court below felt that it was not necessary to reach the question of the merits of Petitioners' case. We agree. However, we submit that a consideration of the Petitioners' case on the merits discloses that it is fatally defective.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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